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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 689

BEVERLY CALL SHEW and JOHN WILLIAM SHEW,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 13-15) is reported at 324 F. 2d 733. The opinion of the district court (Tr. 29-41) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 18, 1. 3 (Pet. 13). The petition for a writ of certiorari was filed on December 18, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court properly denied petitioners' motion to suppress evidence.

## STATEMENT

A four-count indictment returned in the United States District Court for the Middle District of North Carolina charged the petitioners with having committed offenses relating to the liquor laws, in violation of 26 U.S.C. 5601(a) (1), (4), and (7) and 5604(a) (1). Before trial, petitioners filed a motion to suppress and at the hearing agreed to rest their case upon the outcome of the motions (Tr. 28; see Tr. 11, 26-27). The court overruled the motion and (a jury trial having previously been waived) found petitioners guilty as charged (Tr. 28-41). Petitioner John Shew was sentenced to a general term of imprisonment of two years on three counts and on the fourth was placed on probation for five years to commence after release from imprisonment. Petitioner Beverly Shew received a general suspended sentence of 18 months' imprisonment and was placed on probation for five years and fined $2,500. The court of appeals affirmed the convictions *per curiam* (Pet. 13-15).

The pertinent facts may be summarized as follows:

On June 17 or 18, 1962, the sheriff of Davie County, North Carolina, informed Alcohol Tax Unit Agent Robert Martin that he had received information that

an unregistered distillery was housed in a certain barn in the Sheffield area of North Carolina (Tr. 19-20; see Tr. 4-5, 10, 12).

At about 8:30 p.m. on June 18, Agent Martin and two state liquor agents proceeded to a wooded area near a farm occupied by the petitioners and took up positions of surveillance (Tr. 5, 20). The agents were about 250 yards from the petitioners' residence and about 150-200 yards from a nearby barn (Tr. 5-6). Agent Martin observed that lights were on in the barn and that a stake-body truck was parked half-inside the barn (Tr. 8, 14, 23). He heard "thumping" noises which sounded like a "steam boiler" in operation, and "detected the strong, distinct odor of mash" emanting from the barn (Tr. 8, 23). He also heard a "scraping" noise which sounded like cardboard rubbing against metal (Tr. 8-9, 23). At about 9:45 p.m., some hound dogs from petitioners' residence began to bark and roam about, eventually approaching the wooded area and the concealed agents (Tr. 9, 18-19). At about that time, petitioner John Shew left the barn and approached the agents (Tr. 9, 18-19, 23). When he shined a flashlight in the face of one of the agents, Agent Martin identified himself and placed petitioner under arrest (Tr. 9, 18, 20). Mr. Shew was not wearing a shirt, and his trousers and shoes were "saturated" with mash and had a "strong odor" of mash (Tr. 9, 24). When asked whether there was anyone with him at the still, Mr. Shew replied in the negative and commenced to yell "at the top of his voice" (Tr. 9-10, 12). He was told to remain quiet (Tr. 10). When Agent Martin and another agent

walked toward the barn, Mr. Shew shouted 4 or 5 times in a loud voice, "Get out, Get out, Get out" (Tr. 16-17). As Agent Martin neared the entrance to the barn he observed some whiskey inside the truck, the bed of which was backed about two-thirds into the barn, and heard the same "thumping" sound as before (Tr. 14-15, 16, 17-18). Petitioner Beverly Shew was standing outside of the barn and talking to someone inside (Tr. 12-13, 15, 16). Agent Martin placed her under arrest. When the agents entered the barn, an unidentified male escaped through the barn loft (Tr. 13, 16, 17). Inside the barn, the agents found two unregistered stills in operation and 996 half-gallon jars of untaxed whiskey (Tr. 13, 16). There were 804 half-gallon jars of whiskey inside the truck (Tr. 13).

Agent Martin testified that he and the other agents went to petitioners' farm on the night in question in order to see if there was probable cause for a search warrant, and that their intention was to secure a search warrant (Tr. 20, 22).

## ARGUMENT

Petitioners contend that the agents had no right to enter the barn and that therefore the seizure of the stills and other items was invalid. However, as the court below held, the entry into the barn was justified both in order to apprehend the unidentified third person in the barn and as incident to the arrest of Mrs. Shew. In either event, the valid entry justified the seizure of the illegal stills and other materials which were in plain view.

There was probable cause for the arrest of Mrs. Shew. When Mr. Shew was arrested, he was saturated with mash, indicating that distilling was going on. When he shouted "get out", the agents had reason to believe that there were other persons in the barn, and thus had the right to enter the barn to make an arrest. As it happened, Mrs. Shew was arrested outside the barn near the truck which was partly in and partly out.[1] But since the contraband whiskey inside the truck bed with which she was connected extended from outside to inside the barn, the entry by the agents into the barn and the seizure of the additional contraband, which was in plain view, were proper incidents to the arrest. See, *e.g.*, *Draper* v. *United States* 358 U.S. 307; *Crawford* v. *United States*, 160 F. 2d 629 (C.A. 4); *United States* v. *Young*, 322 F. 2d 443 (C.A. 4).

Moreover, since Mrs. Shew was talking to someone inside at the time of her arrest, the agents had the

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[1] Petitioners misstate the record when they assert (Pet. 2, 6, 7, 8) that Mrs. Shew was arrested inside the barn, and that Agent Martin did not observe the whiskey which was in the bed of the truck until after he had entered the barn. The record shows that Agent Martin approached the barn from the rear; that he saw the whiskey in the truck before he observed Mrs. Shew and before he entered the barn (Tr. 15); that Mrs. Shew "was standing a little *behind* the truck [i.e., behind the front of the truck since Agent Martin approached the barn from the rear and the rear of the truck was inside the barn] at the edge of the barn" (Tr. 15); and that, after arresting Mrs. Shew, Agent Martin asked her for "directions on how to get *into* the barn" (Tr. 13). (Emphasis added.) Moreover, Mrs. Shew was talking to someone "inside" the barn at the time of her arrest (Tr. 12-13).

right to enter the barn to try to apprehend the person in the barn. The fact that the unidentified male was able to escape apprehension shows just how important it was for the agents to take reasonably prompt steps to apprehend one who had committed or was committing a felony and who had been given advance warning of the coming of the agents.

## CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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